

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0546

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 27, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective March 1, 2020 (decision # 83810). Claimant filed a timely request for hearing. On July 8, 2020, ALJ L. Lee conducted a hearing, and on July 16, 2020 issued Order No. 20-UI-152219, concluding the employer discharged claimant, but not for misconduct. On July 23, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Worthy Brewing Co. employed claimant from April 8, 2014 until March 2, 2020.

(2) Claimant worked as a server and bartender in the employer's pub, but also worked as a banquet captain for events at the employer's restaurant. The employer's event contract with a customer stated that a mandatory service fee would be included in the customer's bill for the event. Customers sometimes paid a tip intended for event staff in addition to the service fee, although it was rare for a customer to pay a tip that exceeded the amount of the service fee. The employer expected claimant to run the customer's entire payment for an event, including any extra tip, through the employer's payroll. When the employer processed the payment, the employer kept a portion of the service fee and distributed the remaining service fee according to predetermined percentages to employees who worked at the event, including to claimant when she worked as the banquet captain. However, when claimant was working as a server in the employer's pub, and not as banquet captain at an event, the employer did not expect claimant to submit her tips to be processed through the employer's payroll. When working as a server, the pub manager on duty paid claimant cash for the tips claimant received via customers' credit card payments during the shift.

(3) It was common for claimant and other employees to have the pub manager pay them cash for tips received via credit card for working events in the employer's restaurant rather than having the tips processed through the employer's payroll.

(4) The employer's employee handbook contained a tip policy, but the written tip policy primarily addressed how employees should record their tips for tax purposes, and not how employees received their portion of event service fees or tips. *See* Exhibit 1 at 19-20.

(5) As a banquet captain at an event, the employer expected claimant to verify that any apparent error in a customer's bill was not a mistake. The employer also expected claimant to complete her duties with honesty, integrity, and professionalism.

(6) On February 13, 2020, a customer held an event at the employer's restaurant. Claimant acted as the banquet captain, managing the event. The event sales manager left claimant and a prep cook to complete the event alone. It was a busy event, and claimant had more duties than usual including serving, bartending, and managing the event. At the end of the event, claimant gave the customer a bill for \$3,288.30 for the event. Claimant did not customarily review a customer's bill with them unless the customer had questions. An hour later, the customer paid the bill with a credit card and thanked claimant "for going above and beyond." Transcript at 92. When claimant received payment from the customer, she did not look at the bill. The itemized bill included a line item showing the mandatory service fee, which amounted to \$548.05. The customer also wrote in a tip for \$650.

(7) At the end of her shift on February 13, 2020, claimant saw the customer had written a tip for \$650 into the bill for the event that night. Claimant asked the pub manager to be "cashed out" the \$650 tip. Transcript at 30. Claimant received the \$650, and gave a portion of it to the prep cook who was the only other employee who worked with claimant until the end of the event.

(8) Near the end of February 2020, the employer became aware of the \$650 tip from the February 13 event. The employer contacted the customer and the customer told the employer they had intended to pay the \$650 instead of the \$548.05 service fee, and not in addition to the service fee amount.

(9) On March 2, 2020, the employer discharged claimant for allegedly acting in a dishonest manner by failing to verify with the customer that the customer intended to leave a \$650 tip in addition to the service fee, and for asking the pub manager to cash out the \$650 tip rather than having the employer process the tip along with the rest of the payment as part of its payroll procedures.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "[W]antonly negligent" means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a

violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant in part for allegedly engaging in dishonest conduct by failing to verify with a customer that the large tip the customer wrote into a bill was correct before claimant received the tip. It is reasonable that the employer expected claimant to act with honesty and integrity when accepting tips from customers, and claimant should have understood that expectation as a matter of common sense. However, to the extent the employer discharged claimant for failing to verify the tip amount with the customer, the preponderance of the evidence does not show that claimant knew or should have known that her failure to check with the customer about the tip would probably result in a violation of the employer’s expectation that claimant act with honesty and integrity at work.

That a mandatory service fee would be included in the bill was included in the customer’s event contract with the employer, and the itemized bill claimant gave the customer showed the service fee of \$548.05 was included in the bill. Claimant did not customarily review the bill with a customer, and the record does not show that the customer on February 13 had any questions for claimant about the \$3,288.30 bill, or that claimant misled the customer about whether claimant would receive a tip from the service fee included in the bill. The customer had the bill for an hour, and claimant assumed that the customer reviewed the bill during that time and that the tip the customer wrote in the bill was to compensate claimant “for going above and beyond” in her role as banquet manager on February 13. Based on the circumstances shown in the record, claimant could have reasonably assumed the tip was correct. The record does not show that claimant’s failure to verify that the customer intended to pay a \$650 tip in addition to the service fee was a willful or wantonly negligent violation of the employer’s expectations. Therefore, it was not misconduct.

The employer discharged claimant, in part, for allegedly engaging in dishonest conduct by having the pub manager give claimant cash for the February 13 tip rather than having the employer process the tip through payroll. The record supports the employer’s assertion that claimant violated its expectation that claimant submit all event payments, including tips, to be processed through the employer’s payroll rather than having the pub manager pay claimant cash for event tips. However, the record shows that claimant’s February 13 violation occurred as the result of a good faith error on claimant’s part, and not misconduct.

Claimant testified that cashing out credit card tips earned working events was “a standard, common practice” that she and other employees had done “since 2014.” Transcript at 111, 124. The employer’s written tip policy did not address how employees should receive any of their tips, and there was no evidence in the record that claimant had been warned in the past for requesting cash from the pub manager for credit card tip payments for events she had worked in the employer’s restaurant. It appears more likely than not on this record that claimant sincerely, if mistakenly, believed that it was acceptable for her to request a cash payout from the pub manager of the February 13 event tip. Because claimant’s beliefs were reasonable, and based on a sincere but mistaken belief that she was complying with the employer’s expectations, her violation of the employer’s policy regarding event payments was the result of a good faith error. Good faith errors are not misconduct.

For the foregoing reasons, claimant is not subject to disqualification from unemployment insurance benefits because of her discharge by the employer.

DECISION: Order No. 20-UI-152219 is affirmed.

D. P. Hettle and S. Alba;
J. S. Cromwell, not participating.

DATE of Service: August 20, 2020

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.